1975

Larry Shelmidine and Charlene Polly Cook v. Charles A. Jones : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY SHELMIDINE, et al.,
Plaintiffs-Respondents,
CHARLENE POLLY COOK,
Intervenor,
-vs-
CHARLES A. JONES, et al.,
Defendants-Appellants.

Case No. 14152

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE STEWART M. HANSON, JR., JUDGE, PRESIDING.

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BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

The appellants, Charles A. Jones, et al., appeal from the granting to respondent of an Extraordinary Writ in the Nature of Prohibition prohibiting appellants as lay judges from imposing imprisonment or jail sentences upon a conviction of the offense over which they otherwise have jurisdiction.

DISPOSITION IN THE LOWER COURT

The District Court of the Third Judicial District, State of Utah, the Honorable Stewart M. Hanson, Jr., Judge, granted respondents' petition for extraordinary writ in the nature of prohibition prohibiting appellants as lay judges from imposing imprisonment or jail sentences upon a conviction of the offense over which they otherwise have jurisdiction.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's order granting a writ of prohibition and a remand of the case for further proceedings on the charges filed against respondents.

STATEMENT OF FACTS

Respondents were charged with the crime of driving under the influence of intoxicating liquor, Utah Code Ann. § 41-6-44 (1953), as amended. Respondent Larry J. Shelmidine's case was set for trial before appellant Charles A. Jones on January 16, 1975. Respondent John R. Reeves' case was set for trial before Lynn D. Bernard on March 25, 1975. Respondent

Charlene P. Cook's case was set for trial before Charles A. Jones on April 10, 1975.

The penalty involved if respondents are found guilty is imprisonment for not less than thirty days nor more than six months, or by a fine of not less than $100 nor more than $299, or by both such fine and imprisonment.

Trials for all respondents were stayed pending the outcome of this case.

Respondents sought a petition for extraordinary writ of prohibition forbiding appellants from hearing criminal cases where imposition of imprisonment or jail sentence was possible.

The Honorable Stewart M. Hanson, Jr., granted respondents an extraordinary writ of prohibition, modified from respondents' petition, forbiding appellants from imposing imprisonment or jail sentence upon conviction of the offenses over which they otherwise have jurisdiction.

It is from this order that appeal and reversal is sought.

ARGUMENT

POINT I

THE UTAH JUSTICE OF THE PEACE SYSTEM GUARANTEES DUE PROCESS.

Respondents contended in the lower court that the Utah Justice of the Peace system denies defendants due process in criminal cases heard and tried by a non-attorney judge where imprisonment is imposed. The Honorable Stewart M. Hanson, Jr., Third Judicial District Judge, held that following a criminal case, the imposition of a jail sentence or imprisonment by a non-attorney judge denies the defendant the rights to fair trial and to counsel and is void. (The Court did not rule on the respondents' equal protection argument.)

Appellants submit that the Utah Justice of the Peace system as presently constituted guarantees due process and that the right to a fair trial and the right to counsel are preserved within our justice court and "two-tiered" court systems.

A. THE UTAH JUSTICE OF THE PEACE SYSTEM INSURES THE REASONABLE LIKELIHOOD OF A FAIR TRIAL.

In Snyder v. Commonwealth of Massachusetts, the United States Supreme Court stated that a state is free to:

> " . . . regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

The value and necessity of allowing each state a great deal of leeway in making its own policy determinations by balancing the individual and social costs in the due process consideration has long been recognized by the United States Supreme Court. Though Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1144, 86 L.Ed. 591 (1942), was overruled by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this part of the opinion still has application:

> "Asserted denial /of due process of law/ is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed." 316 U.S. at 462.

Thus, due process has a standard of common sense, weighing a standard of fairness and another standard of facts and circumstances, to determine if a particular proceeding meets with the constitutional requisites and insures the defendant the reasonable likelihood of a fair trial.

The denial of due process must be the denial of "fundamental fairness, shocking to the universal sense of justice." Kingsella v. United States ex rel. Singleton, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960). Therefore, the crucial factor in determining the judicial qualifications of

a justice of the peace is whether he is capable of being fair and impartial. It is not a question of whether a justice can, in all instances, conduct an error-free trial. The due process clause has never been interpreted to guarantee the accused an error-free trial. Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), Cf. Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 84 (1972).

Appellant contends that a lay judge is capable of being as fair and impartial as an attorney judge. The Arizona Supreme Court, in their recent landmark case upholding the Arizona Justice Court system held:

> "The fact that a Justice of the Peace is not an attorney does not mean that he is per se unqualified to declare the law in the limited type of situations over which he has jurisdiction. The fact that a judicial error may be made in a proceeding does not necessarily imply a denial of due process of law. The 14th Amendment does not assure immunity from judicial error." Crouch v. Justice of Peace Court of the 6th Precinct, 7 Ariz. App. 460, 440 P.2d 1,000 (1968).

The case of Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), is in point in this regard. The United States Supreme Court held that it was within the bounds of due process for the City of Tampa to authorize municipal court clerks who were neither lawyers or judges to issue warrants, stating that the requirement of being neutral and detached could be met by a layman under judicial supervision. The defendant in Shadwick argued that a lay clerk was incapable of understanding and applying the principles embodied in the Fourth Amendment. To this, the Court answered:

> "It is less than clear, however, as to who would qualify as a 'judicial officer' under appellant's theory. There is some suggestion in appellant's brief that a judicial officer must be a lawyer or the municipal court judge himself. . . But it has never been held that only a lawyer or judge could grant a warrant, regardless of the court system or the type of warrant involved. In Jones v. United States, 362 U.S. 257, 270-271 (1960), the Court implied that United States Commissioners, many of whom were not lawyers or judges, were nonetheless 'independent judicial officers.'" Id. at 347-48.

The Court then stated that the test for the qualifications of a magistrate was whether he was detached and capable of determining probable cause, and held that non-lawyer magistrates were capable of meeting the test.

> "Appellant likewise has failed to demonstrate that these clerks lack capacity to determine probable cause. Our legal system has long entrusted non-lawyers to evaluate more complex and significant factual data than that in the case at hand . . . The significance and responsibility of these lay judgments betray any belief that the Tampa clerks could not determine probable cause for arrest. What we . . . reject today is any per se invalidation of a state or local warrant system on the ground that the issuing magistrate is not a lawyer or a judge. Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers." Id. at 352. (Emphasis added.)

While the Shadwick case decided only that non-lawyer, non-judicial clerks were constitutionally capable of deciding probable cause, it is relevant to the present case. The issue presently before the Court is whether non-lawyer Justices of the Peace are per se unqualified to declare the law in a limited

type of misdemeanor situations. The Shadwick court would reject such a blanket disqualification.

The Court in Shadwick placed great stock in the fact that the non-lawyer clerks who were deciding probable cause had limited jurisdiction and were closely supervised by judicial officers. Similarly, under the Utah system, Justices of the Peace benefit from required legal training, close supervision by higher courts, and limited jurisdiction.

Utah law requires close supervision and training of all Justices of the Peace, assuring that the system meets with reasonable fairness and due process. Utah Code Ann. § 78-5-27, passed in 1971, sets up a mandatory system of continuing education for Justices of the Peace:

> "All justices of the peace shall attend one of two annual institutes to be supervised by the Utah Supreme Court. Any justice not attending one institute during the year shall vacate his office unless he has obtained a written excuse for good cause from the chief justice of the state Supreme Court."

It should also be noted that the Manual for Justices of the Peace in the State of Utah, Bodenheimer, University of Utah Press (1956) [Revised in 1974] by law must be made available

to every justice of the peace:

> "Each county, city or town shall provide and keep current for each justice of the peace within its jurisdiction, a copy of the motor vehicle laws of Utah, handbook for justices of the peace as approved by the Utah Supreme Court, state laws affecting municipalities and its county, city or town ordinances." Utah Code Ann. § 78-5-1.2.

From these two statutes, it is apparent that Utah recognizes the need for and has taken steps to assure the legal quality of its justices of the peace. Both the continuing education requirement and the content of the Justice of the Peace Manual are under the supervision of the Utah Supreme Court, thus assuring that the necessary and accurate legal information will be imparted to all justices of the peace. The Manual is very thorough and contains, among other things, a detailed outline of a criminal trial and sections on evidentiary and sentencing procedures and problems.

However, probably the most valuable form of "continuing education" is the Justice's of the Peace continuous exposure to similar types of litigation. Over eighty percent of the cases

before Justice Courts are traffic violations. Because of this, the justice becomes a specialist in handling certain types of cases, further insuring his awareness of and capability of handling all legal issues.

Beyond the educational requirements, Utah law also sets up a supervisory scheme which anticipates a thorough review of the disposition of cases in justice courts. Utah Code Ann. § 78-5-31 provides:

> "Every justice of the peace shall file a monthly report with his respective county attorney stating the number of criminal prosecutions in his precinct, the character of the offenses charged, the number of convictions, the amount of fines and penalties imposed, and the amount collected. Reports shall be filed the first Monday of the following month."

The justice courts are also subject to and receive the benefits provided under the Court Administrator Act, thus further assuring that the practices and procedures in justice courts will be uniform with those in all other state courts. For example, Utah Code Ann. § 78-3-21 (1953), provides:

> "(3) The (judicial) council shall be responsible for the development of uniform administrative policy for the courts throughout the state. The chief judge shall be responsible for the implementation of the policies developed by the council and for the general management of the courts with the aid of the administrator. The council shall have the following powers, duties and responsibilites:
>
> (a) Establish general policies for the operation of the courts, including uniform rules and forms for practice and procedure, consistent with law and the provisions of this act."

Of course, Utah Code Ann. § 77-57-43 (1953), provides automatic "Trial de Novo" from a verdict of guilty in a justice court, further insuring direct supervision by the higher courts. See Trial de Novo, infra. These three sections of Utah law evidence the State's concern for assuring the existence of a uniform and fair judicial system. Recognizing the need for Justice Courts, the State has made the effort to assure that such Courts comport with due process. The United States Supreme Court has recognized that such systems meet the due process requirements of the Fourteenth Amendment. See, e.g., Shadwick v. City of Tampa, supra.

Another element of the Justice of the Peace system in Utah, which assures compliance with due process standards under the Shadwick decision, is that Justices of the Peace have very limited criminal jurisdiction. Article VIII Section 8 of the Utah Constitution provides:

> "The legislature shall determine the number of justices of the peace to be elected, and shall fix by law their powers, duties and compensation. The jurisdiction of Justices of the Peace shall be as now provided by law, but the legislature may restrict the same."

Pursuant to this constitutional mandate, Utah Code Ann. § 78-5-4 (1953), narrowly restricts the jurisdiction of justice courts.

> "Justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:
>
> (1) Petit Larceny.
>
> (2) Assault or battery not charged to have been committed upon a public officer in the discharge of his duties or to have been committed with such intent as to render it a felony.
>
> (3) Breaches of the peace, committing a willful injury to property and all misdemeanors punishable by a fine less than $300 or by imprisonment in the county jail or municipal prison not exceeding 6 months, or by both such fine and imprisonment."

The importance of this limited jurisdiction is stressed in the Justice's Manual, which devotes a chapter to the subject of criminal jurisdiction and discusses the entire scope and limits of justice court jurisdiction. The Manual admonishes the Justice Court judge to decide the jurisdiction issue prior to any other action.

> "The first question a justice of the peace must consider, when someone comes before him to file a criminal complaint, is whether he has jurisdiction over the subject matter . . . This question is of very great importance to him. If he tries and punishes an offender in a case in which he has no jurisdiction, the whole proceedings are null and void and he may under certain circumstances also become liable for damages." Manual for Justices of the Peace in the State of Utah, page 19.

In conclusion, the United States Supreme Court recognizes the need for non-attorney judicial officers and sanctions their use where there is an adequate system of supervision and limited jurisdiction. Utah law provides for such a system and thus is within the bounds of due process.

B. THE RIGHT TO A TRIAL DE NOVO FROM A VERDICT OF GUILTY IN A JUSTICE COURT FURTHER PRESERVES THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND RIGHT TO COUNSEL.

Appellant has contended that the procedures and safeguards set up by the State insure the accused of a fair trial before a justice of the peace. However, the State further guarantees, by statute, that a defendant who is found guilty by a trial before a justice of the peace has a right to a trial de novo, without the need to allege error, so long as he applies within the statutory time. Utah Code Ann. § 77-57-43 (1953). Furthermore, if the defendant wishes to bypass the justice court altogether, he may plead guilty and obtain a trial de novo without prejudice. See Weaver v. Kimball, 59 Utah 72, 202 Pac. 9 (1921), where the Utah Supreme Court held that even though the defendant had pleaded guilty to a criminal charge in city court, his right to trial de novo in the district court was still preserved under (what is now) Utah Code Ann. § 77-57-38 (1953).

This two-tier system for adjudicating less serious criminal cases was held by the United States Supreme Court in Colten v. Kentucky, supra, meet the demands of due process. Colten dealt with the alleged unconstitutionality of levying a larger fine on trial de novo than was originally assessed in

the justice court (on the basis of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)), Colten had been convicted of a misdemeanor and fined $10. Upon being granted trial de novo (an absolute right in Kentucky, as in Utah), he was again convicted and then fined $50.

Defendant suggested that the two-tier system forced him to "endure a trial in an inferior court with less than adequate protections in order to secure a trial comporting completely with constitutional guarantees." The court acknowledged that many states do not provide full constitutional safeguards, but held that where a trial de novo was available as a matter of right, the two-tier system was not violative of due process:

> " . . . [T]he inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses, Colten v. Commonwealth, 467 S.W.2d at 379.
>
> (M)any . . . systems . . . lack some of the safeguards provided in more serious criminal cases . . . Some, including Kentucky, do not record proceedings and the judges may not be trained for their positions either by experience or schooling.

> We are not persuaded, however that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available." 407 U.S. at 113,118.

The court in Colten recognized the problem with non-attorney judges, yet approved of a system which utilized them. Appellant contends that this answers an issue presently before this Court; utilization of non-attorney judges to hear lower misdemeanor offenses does not violate due process where the right to a trial de novo exists.

The Colten decision properly recognized that justice courts, besides offering a speedy trial, quick deliberation of the issues, convenience, and monetary savings to both defendant and state, offer certain strategical advantages to the defendant:

> "Proceedings in the inferior courts are simple and speedy . . . Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction. He cannot, and will not, face the realistic threat of a prison sentence in the inferior

> court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior court. The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court . . . We cannot say that the Kentucky trial de novo system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in North Carolina v. Pearce, particularly since such restraints might, to the detriment of both defendant and State, diminish the likelihood that inferior courts would impose lenient sentences whose effect would be to limit the discretion of a superior court judge or jury if the defendant is retried and found guilty." 407 U.S. at 119. (Emphasis added.)

Appellant submits that such remarks apply to the Utah Justice Court system as well as the Kentucky system, since both are virtually identical.

The Court's characterization of an inferior court's judgments as "an offer in settlement" is particularly discerning

since the bulk of the cases handled in such courts are traffic violations. Uhlman, Justifying Justice Courts, 52 Judicature 22 (1966).

In light of due process standards, it is reasonable for a state to relegate the bulk of its minor criminal cases through an inferior court system where procedures are more relaxed as long as access to a more sophisticated court is guaranteed.

Appellant contends that all the cases involving the issue of non-attorney judges presiding over misdemeanor cases, where a right to a trial de novo existed, have held that due process was not violated. In Crouch v. Justice of Peace Court of Sixth Precinct, supra, the defendant was charged with driving under the influence of intoxicating liquor, as are respondents in the present case. Upon his conviction the defendant appealed, claiming that the non-attorney justice's giving of jury instructions as to the law was violative of due process. The Arizona Appellate Court held that the giving of such instructions by a non-attorney judge does not deny a criminal misdemeanant due

process of law. This case has been cited by Arizona Appellate courts in upholding the validity of preliminary hearings, involving a felony, presided over by a non-attorney justices of the peace. State v. Lynch, 197 Ariz. 463, 489 P.2d 698 (1971); State v. Dziggel, 16 Ariz.App. 289, 492 P.2d 1227 (1972).

The Illinois Supreme Court in City of Decatur v. Kushner, 43 Ill.2d 334, 253 N.E.2d 425 (1969), and the Federal District Court of Mississippi in Mellikan v. Avent, 300 F.Supp. 516 (D.C. Miss. 1969), upheld the use of non-attorney judges. Both courts casually dismissed the issue, it seems, without doubt as to the firm constitutional basis for non-attorney justices.

> "The contention that the justice of the peace court is unconstitutional because a justice of the peace may be a person who is not trained in the law is unique and of no merit." Mellikan v. Avent, 300 F.Supp. 516 at 519 (D.C.N.D. Miss., 1969).

Respondent, in earlier memoranda, dismissed the value of the above cases because they were pre-Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 1983, 32 L.Ed.2d 530 (1972). Appellant contends that respondent puts too much faith in Argersinger and attempts to extend its holding too far. In the only post-Argersinger case questioning a non-attorney's constitutional

authority to try criminal prosecutions (and subsequently imprison if needed) in a system guaranteeing trial de novo, the Kentucky Appellate Court forcefully upheld the entire lay-man judge, two-tier inferior court system using the same rationale as all the above cases: "The fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge." Ditty v. Hampton Ky., 490 S.W.2d 772 (1972), appeal dismissed 414 U.S. 885 (1973).

The Court recognized that in cases supporting Argersinger's right to counsel, such as In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1966), or White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1962), the Supreme Court never questioned whether the involved proceedings were conducted by non-attorney magistrates and judges. Therefore, the Kentucky Court dismissed the Argersinger argument, concluding that "there never has been any thought that a right to be tried by a lawyer judge grows out of the right to be defended by a lawyer." 490 S.W.2d at 774.

Respondent has attempted to apply the Argersinger argument to this state by citing Gordon v. Justice Court of Yuba,

115 Cal.Rptr. 632, 12 Cal.3d 323, 525 P.2d 72 (1974). However, this is only building error on error. As Ditty v. Hampton, supra, has shown, the Argersinger argument cannot successfully be applied to two-tier court systems such as Kentucky and Utah. To show its affect upon the California Justice Court system, which is not two-tiered and therefore is radically different in affecting defendant's due process rights, only tends to confuse the issues.

The California Justice Court system is inherently infested with due process infirmities not present in Utah's two-tier system. Under California law, the accused does not have a right to trial de novo, but must appeal his case, Cal. Penal Code § 1466 (West 1970). This involves the innumerable problems of burden of proof, grounds for appeal, time and expense. To complicate matters, the accused does not have an automatic right to appeal, but has such only at the discretion of the higher court, Cal. Penal Code § 1469 (West, 1970). Thus, in California, the accused before the justice court is not automatically guaranteed a right to be tried before

an attorney-judge, but has such only if he can allege error prejudicial enough to persuade the higher court.

To further add to the gross inadequacies of California's appellate scheme, the justice courts are not courts of record (Cal. Const., Art VI, § 1). Thus, often times the appeal is based solely "upon a statement of the case settled or prepared by the non-attorney judge himself." 115 Cal.Rptr. at 638. Also, Colten v. Kentucky, supra, spoke extensively about the dangers of vindictiveness inherent in the "appeal" system, see North Carolina v. Pearce, supra.

The Utah Justice Court system is far more protective of the individual's rights. The accused may have the speedy trial with quick deliberation of all issues at little expense of time or money. He may plead guilty while still retaining his right to appeal or he may plead not guilty and force the prosecution to reveal its case against him. Following the verdict of the court--no matter what the determination--the accused is automatically entitled to a trial de novo. This guarantees an opportunity to be heard before an attorney-judge,

without any prejudice or influence from the justice court's rulings or verdict. The de novo court gives no heed to the justice court record, thus insuring that which Gordon attempts to do. In addition, the "possibility of vindictiveness found to exist in Pearce [the appeal system] is not inherent in the Kentucky [or Utah] two-tier systems." Ditty v. Hampton, supra at 775.

Thus, effect on the California appeal system, inherently infirm in protecting the individual's due process rights, cannot be logically extended to the Utah two-tier system which effectively safeguards not only the accused's right to a fair trial, but his right to a speedy trial as well.

C. THE JUSTICE COURT SYSTEM IN UTAH PRESENTLY OPERATES TO GUARANTEE RATHER THAN VIOLATE DUE PROCESS.

The United States Supreme Court has stated that the "(v)indication of Constitutional rights under the due process clause does not demand uniformity of procedure by the states. Each state is free to devise its own way of securing essential justice. . . ." Hysler v. Florida, 315 U.S. 411, 416, 62 S.Ct. 688, 86 L.Ed. 932 (1942). As previously mentioned, the Supreme

Court has held that a two-tier judicial system consisting of justice courts and a right to trial de novo meets with due process, and that the requirements that a magistrate be neutral and detached does not require him to be a lawyer. See Colten and Shadwick, supra. Thus, the due process question concerning non-attorney justices is properly left to each state. When applying the broad restraints of due process, a court should inquire into the nature of the demands on individual freedoms in relation to the social needs which justify these demands. Frank v. Maryland, 359 U.S. 360, 363, 79 S.Ct. 804, 3 L.Ed.2d 877 (1959).

As was stated earlier, the "asserted denial (of due process of law) is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." Betts v. Brady, supra, 316 U.S. at 462.

While the complaint in this case is limited to Salt Lake County, a decision for the plaintiffs would have serious ramifications on the justice of the peace systems throughout

the entire state. (Here again, note that since the population distribution in Utah differs greatly from that in California, the due process considerations must be examined differently in the present case than in Gordon v. Yuba City, supra.) Because of its rural characteristics, it may be highly unfeasible, if not impossible, to have an attorney justice of the peace in many of the rural counties of Utah. A study of the Utah court system has revealed:

> "(M)any counties do not have sufficient legal business or law trained personnel to justify city courts even at the county seats. Motorists, particularly tourists, either state residents or non-residents, could be subjected to considerable inconvenience if ready access to a method of adjudicating traffic violations were not available. An equally substantial burden would be imposed upon law enforcement personnel if judicial officials were not readily available, particularly in view of the broadened constitutional protections being developed by the United States Supreme Court." Anderson & Lockhart, Utah Courts Today, Report to the Legislative Council, 34 (1966).

The ANNUAL ROSTER OF ACTIVE RESIDENT UTAH ATTORNEYS of 1975 reveals that there are no attorneys at all in Daggett, Morgan, Piute, Rich, Wayne and Kane Counties. Only one attorney resides in Garfield County and the counties of Beaver, Emery

and Summit have only two attorneys. Several other counties have only three or four attorneys residing within sparsely populated large geographical areas. These statistics demonstrate that to require all justices of the peace to be attorneys would toll the "death knell" to the justice of the peace system in much of Utah. Presently, at least in the rural districts of the state, the proposed requirement that justices of the peace be attorneys would not lead to fairer administration of justice, but exactly the opposite. Such problems could deny the accused his right to speedy trial, add considerable expense and time to his right to trial, discourage him from participating in costly litigation, add to the increasing disrespect for law and courts, and handicap effective law enforcement and adjudication. Thus, a more thorough due process analysis, taking into account the specific circumstances of this case and weighing the relevant policy factors would seemingly compel the retention of the non-attorney justice of the peace. Appellant contends that the decision of whether to abolish the justice of the peace system or the use of non-attorney justices in that system is best left to the state legislature.

The Supreme Court in Shadwick, supra, recognized that states had a valid interest in using competent lay personnel in their court systems:

> "Many municipal courts face stiff and unrelenting caseloads. A judge pressured with the docket before him may give warrant applications more brisk and summary treatment than would a clerk. All this is not to imply that a judge or lawyer would not normally provide the most desirable review of warrant requests. But our federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality." 407 U.S. at 353-54. (Emphasis added.)

The Justice of the Peace system in Utah, by relieving an otherwise overwhelming caseload on city courts, is a guarantor rather than a violator of due process. Not only is it impossible to prove that a non-lawyer judge is per se less capable of handling a misdemeanor trial, it is very likely that doing away with such justices--with its concommitant effect on the entire system--would be a denial of due process and, perhaps, a denial of the right to a speedy trial.

POINT II

THE UTAH JUSTICE COURT SYSTEM DOES NOT DENY THE ACCUSED THE RIGHT TO EFFECTIVE COUNSEL.

The right to counsel in certain criminal prosecutions is guaranteed by the "Sixth Amendment which in enumerated situations has been made applicable to the states by reason of the Fourteenth Amendment" and which "provided specified standards for 'all criminal prosecutions.'" Argersinger v. Hamlin, supra. The assistance of counsel when there is a potential for imprisonment, is required to comply with such a standard; so that a defendant may be adequately assured of his "right to be heard." Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). It is, therefore, the function of counsel to assure this right of adequate representation.

The function of the court, however, is radically different. The Kentucky Court succinctly stated the obvious:

> "Due process, as regards the tribunal hearing a case, usually has been considered to require only that the tribunal be fair and impartial. In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed.2d 942 (1955). The function of the court is not to defend the accused, or to represent him, but to decide fairly and impartially. An accused needs counsel to defend him, as pointed out in Gideon v. Wainwright, because the government employs lawyers to prosecute him--because our system of criminal justice is an adversary system. But the judge is not one of the accused's adversaries,

> and is not there either to defend or to prosecute him. So the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge." 490 S.W.2d at 774-775.

The United States Supreme Court has never acknowledged, either explicitly or implicitly, that an accused in a criminal prosecution had the right to an attorney-judge. In Ditty, the Court reviewed the cases making up the backbone of Argersinger: Gideon v. Wainwright, supra; Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); White v. Maryland, supra; and In Re Gault, supra. The Kentucky Court concluded:

> "Never on the occasion of any of those decisions, was it even suggested that the right to counsel carries with it the right to be tried by a lawyer judge. Obviously, the Supreme Court was aware, when it decided White v. Maryland, that examining trials frequently are conducted by nonlawyer magistrates, and was aware, when it decided Gault, that juvenile court judges in many areas are not lawyers. Yet no question was recognized as existing with respect to the composition of the examining courts and juvenile courts.
>
> "All this is to show that there never has been any thought that a right to be tried by a lawyer judge grows out of the right to be defended by a lawyer." 490 S.W.2d at 774.

The Court added:

> "We believe there are strong considerations that would support a holding that even if due process required lawyer judges for courts of general criminal jurisdiction, the requirement would not apply to the inferior courts in the Kentucky two-tier system." Ibid at 776.

It is interesting to note, in light of respondent's contentions that Argersinger demands an attorney-judge in criminal prosecutions resulting in imprisonment, that Colten v. Kentucky was decided the same day as Argersinger. Colten was also argued after Argersinger, allowing the court to make their decision supporting the Kentucky non-attorney judge, two-tier system after hearing all arguments supporting Argersinger.

In conclusion, the Supreme Court has never implied that the functions or the qualifications of the judge be the same to those of an attorney. Indeed, the opposite is true. The judge need only be fair and impartial. A formal legal training is not a prerequisite to fairness and impartiality.

The non-attorney justice, because of his limited jurisdiction and similar cases, quickly becomes familiar

with and competent to handle recurring issues. In the courtroom, a fair and impartial resolution of complex questions can be made when counsel clarifies the issue while advocating his client's position. Whether or not error results, the accused has an automatic right to trial de novo to clarify or rectify any dispute.

CONCLUSION

Each state is allowed to regulate its own court procedure in the manner serving its interest best. The Utah Legislature has established a two-tiered system, with trial de novo, providing the accused with protections and rights that other states' systems lack. The Legislature further insures the accused a fair trial in a justice of the peace court by requiring continuing legal education, close supervision by higher courts, and limited jurisdiction.

All cases involving the issue of non-attorney judges presiding over misdemeanor cases, where a right to trial de novo existed, have held that due process was not violated. Gordon v. Justice Court, supra, is not applicable to the present case due to the radical differences between California's and Utah's Justice Court system.

The right to effective representation by an attorney in criminal cases has never been held, nor inferred, by the United States Supreme Court to establish a right to an attorney-judge in misdemeanor cases resulting in imprisonment or jail sentence.

For these reasons and for the reasons stated within these arguments, appellants contend that the decision of the lower court should be reversed and remanded for disposition not inconsistent with this Court's opinion.

Respectfully submitted,

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